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No. 08-836

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In The Supreme Court of the United States

DAVID E. WELCH,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND CARDINAL BANKSHARES CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a federal court reviewing an administrative agency's decision required to consider new legal arguments and authorities that the claimant never presented to the agency?

CORPORATE DISCLOSURE STATEMENT

Respondent Cardinal Bankshares Corporation is a publicly held corporation. It has no parent corporation and no public corporation owns more than 10% of its stock.

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PRELIMINARY STATEMENT

This Court should deny certiorari since the Court of Appeals' decision correctly applied the principle that a party challenging an agency's action may not raise arguments that were never presented to the agency. In his Petition, Welch does not even mention, let alone challenge, the Court of Appeals' dispositive ruling on the waiver issue. Instead, he attempts to raise arguments about the substantive elements of Sarbanes-Oxley whistleblower claims. Because of its waiver holding, however, the Court of Appeals never even *reached* those issues. That forecloses their consideration here. But even assuming the Court of Appeals had reached those issues, the Petition still should be denied because (1) it does not raise legal questions on which there is a conflict among the courts of appeals, and (2) Welch's claim that the generally accepted accounting principles allegedly in dispute in this case can be the basis for a Sarbanes-Oxley whistleblower complaint lacks any support in the record and in the law. As this case was completely, and correctly, decided on waiver grounds, it does not present any issue worthy of certiorari.

STATEMENT OF THE CASE

Factual Background

Because the Petition contains a number of material inaccuracies and omissions, Respondent presents the following restated summary of facts.

Respondent Cardinal Bankshares Corporation[1] is a bank holding company whose sole asset is the Bank of Floyd, a small community bank in rural southwest Virginia.[2] The Bank hired Petitioner David Welch, a certified public accountant, in February 1999. Welch started as a part-time accounting officer. A year later, however, Welch requested full-time employment and the title of Chief Financial Officer. The Bank's President and Chief Executive Officer, Leon Moore, agreed. (JA 139-40, 303-05).[3]

Welch's own notes show that as early as 2001 he understood that his job was in jeopardy because of performance issues and a perceived lack of trust in him. (JA 204). In addition, Welch believed that a proposed merger put his position at risk, writing that "(w)ith a merger, elimination of positions are [sic] likely." (JA 141, 306, 315).

Welch's worries over his position were compounded in August 2002, when the Bank received an unfavorable examination by state banking regulators—largely as a result of recurring errors in the "call reports" that Welch prepared. (JA 147-50). Although Welch certified those reports when they were submitted, he gave shifting accounts of his role in their preparation. The senior examiner stated

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[1] Cardinal Bankshares Corporation is not affiliated with "Cardinal Bank," the much larger DC-area bank.

[2] Unless the context requires otherwise, Respondent will refer to the Cardinal Bankshares Corporation and the Bank of Floyd as "the Bank."

[3] "JA" references are to the Joint Appendix filed with the Court of Appeals.

that Welch had blamed many of the errors on the Bank's outside auditors who, the examiners stated, Welch said prepared one of the most problematic reports (the March 2002 report) while he was on sick leave. (JA 147). At trial, Welch acknowledged that he had prepared the erroneous March 2002 report before going on sick leave. He denied, however, that he had blamed the deficiencies in that report on others. (JA 88).

In early September 2002, a month after Congress enacted Sarbanes-Oxley, Welch attended a seminar on the statute. (JA 75-76). Afterwards—and with the Bank's merger looming—Welch accused various Bank employees, including CEO Leon Moore, of accounting improprieties. These accusations mostly concerned transactions that had occurred a year earlier, in the second and third quarters of 2001. (JA 193, JA 276).

Welch's primary complaint was an alleged accounting misclassification of $195,000. (JA 62). The $195,000 represented recoveries on a previously written-off loan and a residual payment on a lease. These recoveries had been credited directly to income. Welch, however, claimed that banking regulations required the Bank first to credit the recoveries to the reserve account for loan losses; the recoveries would flow to income only indirectly, through an offsetting reduction in provision expense.[4] (JA 63-64, JA 178).

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[4] Banks must allocate funds to keep their reserve accounts at adequate levels. This is reflected in the "provision" expense item in income statements.

Although Welch and the Bank disagreed whether accounting principles required the recoveries to be treated as Welch alleged, there is no dispute that—however characterized—the Bank had in fact recovered *$195,000 of additional money that it previously* did not have, the receipt of which increased the Bank's net income by $195,000. (JA 63-64, JA 178). Moreover, even though Welch disagreed with the Bank's accounting treatment of the $195,000, he certified the second and third quarter 2001 financial statements as accurate. (JA 104).

In September 2002, however, Welch stated that he would not certify the Bank's third-quarter *2002* financial reports because they included, for comparison purposes, the third-quarter *2001* figures. (JA 64). Welch's only evidence of the materiality of this alleged misclassification was his observation that the Bank's stock price increased between September and October 2001. He claimed that stockholders were enticed to purchase the Bank's shares during this period because of the Bank's treatment of the $195,000 recoveries. (JA 62). But even though the third quarter ended on September 30, 2001, the third quarter *report* that included the $195,000 was not released until November 14, 2001. (Pet. App. 45a n.16). Thus, the allegedly misleading report had not even been published at the time Welch claimed the public had been misled by it.

Welch also claimed—again, with no evidentiary support—that his access to the Bank's external auditing firm had been restricted. Even though Welch had previously worked at the same auditing firm, he complained that the firm regularly communicated with the Bank's CEO and not with him. There are multiple pieces of correspondence between Welch and

the auditing firm that disproved this claim. (JA 164).

Finally, Welch complained about internal procedures at the bank. At the Bank of Floyd, like most small community banks, employees without specific journal accounting training make entries in the general ledger. (JA 165). Welch alleged, however, that this meant the Bank had "inadequate internal controls." (JA 69, JA 277). But even though Welch was responsible for the Bank's financial accounting, was responsible for reviewing the entries, and claimed to have concerns about them, he never reviewed the entries. (JA 25, 68). And he never claimed that anyone at the Bank prevented him from doing so, either.[5]

Instead of communicating his concerns to the Bank's Audit Committee, Welch threatened Bank employees with a Sarbanes-Oxley charge unless he received a buyout. On September 20, 2002, Welch convened a meeting of Bank employees on the pretence of giving them a presentation on Sarbanes-Oxley. (JA 110). Instead, Welch accused several of his co-workers of fraud. Welch tape-recorded that portion of the meeting. (JA 193). He did *not* record the second half of the meeting, which involved his attempt to negotiate a severance package with Marie Thomas, the Bank's Humans Resources Director, and

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[5] Welch also accused CEO Leon Moore of insider trading—allegations that the ALJ failed to find had any factual basis. Welch never appealed the ALJ's failure to find protected activity for these false accusations and does not now claim that these allegations of insider trading constituted protected activity. Nevertheless, Welch repeats the insider-trading claims in his Petition.

Fred Newhouse, the bank's Executive Vice President. (JA 113, JA 116). But as the notes that Welch prepared for the meeting reveal, he wanted the Bank to vest his retirement benefits, pay him a bonus, pay him a severance package, and provide a good reference. Welch said that if the Bank did this he would, in his own words:

> "Just quietly leave the bank." (JA 204)
>
> "[W]ith reasonable severance package—6:00—gone." (JA 307)
>
> He would "just ride off into the sunset." (JA 116).

Welch warned that discharging him "might not be the wisest choice" because he could bring a "whistleblower protection" suit under Sarbanes-Oxley. (JA 306-07).

Rather than pay Welch to "quietly leave the bank," CEO Leon Moore—one of the persons Welch had accused of wrongdoing—informed the Audit Committee of Welch's complaints. (JA 292-93). The Audit Committee retained outside counsel and an outside accountant to investigate Welch's accusations.[6] The investigators sought to meet with Welch and assured him that he was not a target of the investigation. (JA 205, JA 221, JA 223). Instead of explaining his concerns to the Audit Committee investigators, however, Welch refused to meet with them unless his personal lawyer was present. (JA 225).

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[6] CEO Moore recused himself and took no part in the investigation (JA 191) or in the subsequent Audit Committee's deliberations. (JA 231-32).

Because the investigation concerned internal, confidential, and sensitive matters involving the Bank (a public company), the Audit Committee rejected Welch's demand to have his lawyer present during the internal investigation of Welch's own allegations.[7] (JA 223). The Audit Committee chairman assured Welch that the subject of the meeting did not involve Welch's own employment issues; rather, it concerned the accusations that Welch had leveled at other employees. (JA 221). Nevertheless, the Audit Committee stated that Welch's cooperation with the investigation *was* a condition to his continuing employment. (JA 221, JA 223).

Although he was given multiple opportunities to meet with the Audit Committee investigators, Welch repeatedly refused to do so without having his lawyer present. Welch's lawyer confirmed this refusal in a letter to the Bank, stating that Welch would not attend a meeting with the investigators without his personal attorney present. (JA 225, 228). The Bank refused to yield to these demands.

Meanwhile, the representatives hired by the Audit Committee to review Welch's allegations of wrongdoing continued their investigation—albeit without Welch's assistance. They found no evidence of wrongdoing by other Bank employees. Relying on the investigators' report, the Audit Committee concluded that Welch's complaints were either unfounded, immaterial, or both. (JA 233-37).

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[7] In addition to the other reasons, it would have been inappropriate to have Welch's outside lawyer present because of the pending merger and other confidential items which might arise.

Because Welch—the Bank's CFO—had disobeyed the Audit Committee's instructions to cooperate in its investigation of Welch's own accusations, the Audit Committee recommended to the Board of Directors that Welch be discharged for insubordination. (JA 232). The Board accepted this recommendation and discharged Welch. (JA 238-39).[8]

The OSHA investigation and the decision of the Administrative Law Judge

Shortly thereafter, Welch commenced a whistleblower action under 18 U.S.C. § 1514A. This section gives whistleblower protection to employees who "provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders . . . ." 18 U.S.C. § 1514A(a)(1). Such complaints must be brought initially in the Department of Labor. 18 U.S.C. § 1514A(b)(1)(A).

The implementing regulations require a complainant to show (1) he engaged in protected activity; (2) his employer knew, actually or constructively, of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the personnel action. 29 C.F.R. § 1980.104(b). To establish "protected activity," the employee must show that he had "both 'a subjective belief and an objectively reasonable belief that the

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[8] CEO Moore took no part in the decision to terminate Welch. (JA 140; JA 280).

conduct he complained of constituted a violation of relevant law.'" (Pet. App. 11a) (quoting *Livingston v. Wyeth*, 520 F.3d 344, 352 (4th Cir. 2008)). The regulations give OSHA the initial responsibility to investigate claims. *See* 29 C.F.R. 1980.104 (requiring the Assistant Secretary to conduct an investigation); 29 C.F.R. § 1980.101 (defining "Assistant Secretary" as "the Assistant Secretary of Labor for Occupational Safety and Health").

The OSHA investigator in this case dismissed Welch's complaint, finding that the Bank had a legitimate reason for discharging Welch—namely, Welch's refusal to discuss his allegations of fraud without having his personal lawyer present. (JA 48).

Welch requested an evidentiary hearing before an Administrative Law Judge. The ALJ conducted a hearing and ruled in Welch's favor. Relevant here, the recommended decision and order identified three "violations" that the ALJ claimed were sufficient to constitute protected activity under SOX:

(1) The Bank erroneously classified a $195,000 recovery as income rather than as a credit to loan-loss provision;

(2) The Bank had allowed certain persons without accounting experience to make entries in its ledger; and

(3) The Bank had restricted Welch's access to outside auditors.

(Pet. App. at 143a-156a). The ALJ, however, never identified any law that these items implicated. He never linked the "violations" to any of the statutes enumerated in Section 1514A.

The decision of the Administrative Review Board

The Bank appealed the ALJ's ruling to the Department of Labor's Administrative Review Board ("ARB"). 29 C.F.R. § 1980.110. In its briefs to the ARB, the Bank pointed out that neither the ALJ nor Welch had ever explained how any of the so-called "violations" related to any of the laws enumerated in Section 1514A. (Pet. App. at 16a-17a).[9]

Welch—who was represented by experienced counsel at all stages of this case—failed to cite any relevant statute or regulation that he believed was violated. Instead, he offered broad generalizations about the purposes of securities laws and Sarbanes-Oxley. He claimed that the Bank's conduct violated the broad "purposes" of securities laws, as stated on the SEC's website. And he quoted accounting treatises rather than the statutes and regulations enumerated in Section 1514A. Welch never "tied" the specific "violations" to any specific law.

The ARB found that Welch's arguments were wholly inadequate to establish that he had engaged in protected activity under Section 1514A. With respect to the $195,000 recovery, the ARB made two alternate findings. It first noted that the Bank had actually received the $195,000. At worst, the error was one of misclassification. The ARB found that it was not misleading for the Bank to report the recovery as income since it was, in fact, new money received.

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[9] Cardinal asserted other grounds for reversing the ALJ opinion, but the ARB did not need to reach those arguments.

In its second holding—the one the Court of Appeals ultimately affirmed—the ARB noted that Welch failed to present any legal authority to support his claim of protected activity. It observed that Welch appeared to be arguing that any violation of the standards imposed by GAAP, GAAS, or FFIEC were ipso facto violations of federal securities law because those standards have the same investor-protection purposes as the securities laws. (Pet. App. 38a). The ARB correctly noted, however, that neither the text of Section 1514A nor the rules promulgated thereunder substantiated Welch's argument. Thus, the ARB observed that *"Welch has not supported this argument with any authority."* (*Id.*) (emphasis added).

The ARB made similar rulings on the remaining two items identified by the ALJ, stating that neither Welch nor the ALJ had explained how those "violations" implicated the federal securities laws—an essential condition if such complaints were to constitute protected activity. (Pet. App. 40a, 42a). Because Welch failed to support his argument with any relevant authority, the ARB found that he had failed to establish protected activity and, thus, it denied his complaint. (Pet. App. 42a).

The decision of the Court of Appeals

Welch appealed the matter to the Court of Appeals, which affirmed the ARB. In an unanimous panel opinion authored by Judge Motz, the Court of Appeals agreed with the ARB's "second rationale for its dismissal of Welch's complaint," namely that "Welch . . . failed to explain to the ARB how he could have had an objectively reasonable belief that these actions violated any of the laws listed in § 1514A." (Pet. App. at 15a-16a).

In analyzing this issue, the Court of Appeals reviewed the materials that had been submitted to the ARB. Indeed, after oral argument it obtained the full 11-volume administrative record.[10] The court's opinion reflects a review of the full record. For example, even though the parties had not included their ARB briefs in the Joint Appendix, Judge Motz quoted extensively from those briefs in her analysis of the ARB's decision. (Pet. App. 16a-17a).

After its review of the administrative record, the Court of Appeals reached the same conclusion as the ARB: Welch "utterly failed" to present the ARB with any relevant legal argument to support his position that the three "violations" identified by the ALJ related to any violation of the statutes or regulations enumerated in Section 1514A. (Pet. App. at 17a). The court observed, for example, that Welch's arguments to the ARB about the $195,000 in the third-quarter 10-QSB report relied, in part, on "regulations passed years *after* the filing of that report." (Pet. App. 20a n.5). It pointed out that Welch cited "regulations which clearly do not fall within the purview of § 1514A." (*Id.*). And it noted that Welch cited "general accounting standards and the general purpose of the securities laws" but failed before the ARB to "explain—as he attempts to on appeal—how a person could reasonably believe that the failure to correct the 10-QSB report might violate any relevant federal law or applicable SEC regulation." (*Id.*). For the

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[10] *See* Case No., 07-1684, Docket Entry #109, dated June 16, 2008 (reflecting receipt of 11-volume record). The Department of Labor previously had submitted a certified list in lieu of the complete administrative record. *See* Docket Entry #38, dated October 5, 2007.

other alleged instances of protected activity, too, the Court found that no apposite legal argument had been presented to the ARB. (*Id.*).

Because Welch had "completely failed to raise any relevant arguments before the ARB," the Court of Appeals upheld the ARB's ruling that Welch had not engaged in protected activity. (Pet. App. 17a-18a) (*citing Hall v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 476 F.3d 847, 861 n.8 (10th Cir. 2007), *cert. denied* 128 S. Ct. 489 (explaining that the ARB is not required to "*sua sponte* raise legal theories referenced only obliquely by a party but not clearly articulated in its briefs") and *Taylor v. U.S. Dept. of Labor*, 440 F.3d 1, 8-9 (1st Cir. 2005) (stating that "appellants have forfeited the argument by failing to raise it during the administrative proceedings")).

This appeal followed.

REASONS FOR DENYING THE WRIT.

This Court should deny certiorari for three independently sufficient reasons.

First, Welch's "Questions Presented" fail to address the actual basis for the Court of Appeals' decision. The Court of Appeals affirmed the ARB's decision because Welch had "utterly failed" to present the ARB with any legal authority to support his protected-activity argument. (Pet. App. 17a). The court refused to entertain any of Welch's new arguments, observing that Welch had waived those points by not raising them in his arguments to the ARB. In his Petition, however, Welch completely ignores this dispositive basis for the Court of Appeals' decision. His "Questions Presented" instead raise issues relating to the substantive requirements for protected activity under Section 1514A. But the Court of Ap-

peals never even *reached* those questions, deciding the case entirely—and appropriately—on waiver grounds. Because the questions that Welch asks this Court to address are not properly presented in this appeal, the Court should deny certiorari.

Second, even if the Court of Appeals had reached the merits of the protected-activity issue, there is no conflict among the circuits that would warrant certiori. To date, only three circuits—the First Circuit, the Fourth Circuit and the Fifth Circuit—have addressed the requirements for protected activity in Sarbanes-Oxley whistleblower cases. All three circuits have analyzed the issue identically, adopting an objective-reasonableness standard. Accordingly, there is no inter-circuit conflict that this Court needs to resolve.

Third, Welch's protected-activity argument fails even on its own terms. Welch argues that GAAP violations are violations of Sarbanes-Oxley and, thus, complaints about perceived GAAP violations can be the basis for Sarbanes-Oxley whistleblower claims. Yet Welch fails to support this argument with any legal authority that establishes that GAAP violations are per se violations of Sarbanes-Oxley. Moreover, there is no basis in the record for his claim that the alleged misclassification of the $195,000 was a GAAP violation. So even if the merits of his protected-activity arguments were reviewable in this appeal—and they are *not*, because the Court of Appeals decided the case on waiver grounds—his arguments still fails as a matter of law.

For all these reasons, amplified below, this Court should deny certiorari.

I. THE COURT OF APPEALS CORRECTLY HELD THAT WELCH WAIVED HIS PROTECTED-ACTIVITY ARGUMENTS BY NOT FIRST PRESENTING THEM TO THE DEPARTMENT OF LABOR.

Welch's "Questions Presented" are noteworthy for what they do not include. They do *not* encompass the issues that actually led the Court of Appeals to affirm the ARB's decision. The legal basis for the Court of Appeals' decision—stated clearly in Section IV.B of its opinion and reproduced on pages 15a-18a of the Petitioner's Appendix—was that Welch failed to present any relevant legal argument to the ARB showing how the matters about which he complained implicated the laws encompassed by Sarbanes-Oxley's whistleblower provision. The Court of Appeals properly refused to entertain legal arguments that had not first been presented to the ARB: "We . . . hold that Welch completely failed to raise any relevant arguments before the ARB and may not now raise new arguments before this court." (Pet. App. at 18a).

Welch does not challenge this waiver holding in his Petition. He does not, for example, claim that the Court of Appeals erred in holding that a federal court may not consider arguments that were not first raised in the agency under review. Nor does Welch identify any error in applying that rule to the history of this case. Thus, Welch's appeal does not challenge the legal basis for the Court of Appeals' decision.

Welch likely has ignored the Court of Appeals' waiver analysis because the legal principles underlying it are settled and raise no novel issues meriting this Court's review. Under the doctrine of "issue exhaustion," a reviewing court may not reverse an agency adjudication on grounds that were not first

presented to the agency itself. *Sims v. Apfel*, 530 U.S 103, 108 (2000); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952). This requirement is particularly stringent in cases involving *adversarial* agency proceedings: "Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest." *Id.* at 110 (citing, *inter alia*, *Hormel*, 312 U.S. at 556, and *L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 36).

Sound policy considerations underlie the issue-exhaustion doctrine. Respect for the administrative process is foremost:

> The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946). But concern for orderly procedure and fairness to the other participants in the process also factor into the equation: "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objec-

tion made at the appropriate time . . . ." *L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 37.

In the present case, the Court of Appeals properly refused to entertain legal arguments that Welch had not raised before the ARB. As noted above, the Court of Appeals—having the complete administrative record before it—searched for any relevant legal argument that linked the alleged GAAP, GAAS, and FFIEC "violations" to the actual statutes and regulations encompassed by Section 1514A. Like the ARB's own review of Welch's arguments, however, the Court of Appeals found nothing.

Welch's arguments to the ARB contained only broad generalizations about the purposes of the securities laws, quotations from accounting treatises, and irrelevant or inapplicable laws and regulations. Absent from his argument was any attempt to connect, in a concrete way, the specific matters he complained about with any law covered by Sarbanes-Oxley's whistleblower provision. As the Court of Appeals found, "[Welch] never explained how a person could have an objectively reasonable belief that this conduct violated any of the laws listed in § 1514A." (Pet. App. at 21a, n.5).

Although the waiver issue was decisive for the Court of Appeals, Welch fails to address it in his Petition. He does not, for example, identify where—in his argument before the ARB—he cited any authority showing that the "violations" identified by the ALJ actually related to the securities laws encompassed by Section 1514A. Nor does Welch explain which of his current legal arguments he actually

presented to the ARB.[11] Instead, Welch ignores the waiver issue altogether and argues the merits of the protected-activity question as if the waiver problem did not even exist.

The waiver problem *does* exist, and it is fatal to Welch's Petition for two reasons. First, it limits the questions properly reviewable on appeal. Because the Court of Appeals decided the appeal on the threshold procedural ground that Welch failed to present his arguments to the ARB, it did *not* reach—nor was it required to reach—the merits of Welch's protected-activity arguments. It simply held that, whatever the merits of Welch's newly asserted legal arguments, the court could not address them because Welch had not first presented them to the ARB. Because the Court of Appeals decided the matter on waiver grounds, the case was not (and is not) a proper vehicle to address the substantive issues relating to Sarbanes-Oxley whistleblower claims that Welch attempts to raise in his Questions Presented.

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[11] The only reference to the waiver issue appears on page 17 of his Petition, which states "Petitioner made this precise argument before both the court of appeals and the ARB." He is referring to his argument that violations of GAAP are ipso facto violations the securities laws—including Sarbanes-Oxley—and thus can serve as the predicate for protected activity under § 1514A. But as the ARB pointed out in its opinion, Welch never cited any relevant law to support this bare argument. (Pet. App. at 38a). The Court of Appeals, too, remarked on the absence of any relevant authority to support this argument. (Pet. App. at 17a, 20a-21a n.5). In his Petition, Welch fails to identify what laws he cited to the ARB to support his argument that complaints about perceived violations of GAAP or GAAS standards amount to complaints about violations of the federal securities laws referenced in § 1514A.

The Court of Appeals did not even *reach* those substantive protected-activity issues.[12] *A fortiori*, it could not have erroneously decided them.

Second, the principle of administrative law on which the Court of Appeals' decision hinged—i.e., that a reviewing court will not consider issues that have not been first presented to the agency under review—is well established in decisions of this Court. *See supra* at 15. It is not a question requiring further clarification or elaboration. And even if it were, this is not the case in which to do it, as Welch fails even to include it in his Questions Presented. *See* S. Ct. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

To summarize: the Court of Appeals fully—and correctly—decided this case on waiver grounds. Because Welch neither challenges this waiver holding in his Questions Presented nor provides any basis for this Court to question the soundness of the

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[12] The Court of Appeals did not find that Welch failed to engage in protected activity, it simply found that he failed to present sufficient legal argument and authority to the Department of Labor to support his protected-activity claim. (Pet. App. at 18a) ("We simply hold that Welch failed to raise any relevant arguments before the ARB"). Thus it did not rule one way or another on Welch's first question presented. (Pet. at i).

Nor did the Court rule on the second question presented. Contrary to Welch's argument, it did *not* hold that complaints about violations of Sarbanes-Oxley could not support a whistleblower claim under Section 1514A. Welch has not identified—and cannot identify—anywhere in the Court of Appeals' opinion that addresses that particular legal question.

Court of Appeals' waiver analysis, this Court should deny certiorari.

II. THERE IS NO CONFLICT IN THE CIRCUITS ON THE PROPER STANDARD FOR EVALUATING PROTECTED ACTIVITY IN WHISTLEBLOWER CASES BROUGHT UNDER 18 U.S.C. § 1514A.

A. The three courts of appeals that have addressed the issue apply a uniform standard for protected activity.

Even if the Court of Appeals did reach the merits of Welch's protected-activity arguments—and it did *not*—there still is no basis for certiorari because the decision below is not "in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a).

To date, only three Circuits, the First Circuit, the Fourth Circuit, and the Fifth Circuit, have addressed what a Sarbanes Oxley whistleblower claimant must show in order to establish protected activity under 18 U.S.C. § 1514A. *See Allen v. Admin. Review Bd.*, 514 F.3d 468 (5th Cir. 2008); *Livingston v. Wyeth*, 520 F.3d 344 (4th Cir. 2008); *Day v. Staples*, No. 08-1689, 2009 U.S. App. LEXIS 2266 (1st Cir. Feb. 9, 2009). All three circuits employ an "objective-reasonableness" standard, requiring whistleblower complainants to establish both a subjective belief *and* an objectively reasonable belief that the conduct they reported constituted a violation of one of the laws enumerated in Section 1514A. *Allen*, 514 F.3d at 477; *Livingston*, 520 F.3d at 352; *Day*, 2009 U.S. App. LEXIS 2266 at *27-*28 n.10.

The three circuits articulate the objective-reasonableness standard in nearly identical terms. They all take into account the employee's professional background. *Allen*, 514 F.3d at 477 ("The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. . . ."); *Livingston*, 520 F.3d at 352 ("Livingston must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation."); *Day*, 2009 U.S. App. LEXIS 2266 at *29 n.10 ("We consider the district court's concern about the plaintiff's particular educational background and sophistication to be relevant").

This objective-reasonableness analysis is consistent with the plain language of the statute, which allows relief only where "the employee *reasonably* believes" there was a violation of relevant law. 18 U.S.C. § 1514A(a)(1) (emphasis added). It is consistent with how the Department of Labor has interpreted the statute in its rules governing Sarbanes-Oxley whistleblower complaints. *See* 29 C.F.R. § 1980.102(b)(1) (defining protected activity to encompass only reports of actions that the "employee *reasonably believes* constitutes a violation" of the relevant laws) (emphasis added). And it is consistent with how the ARB has interpreted the statute and regulations in this case. Pet. App. at 32a-33a.

Because the courts of appeals are consistently and correctly interpreting the requirements for protected activity under Section 1514A, the Bank respectfully submits that this Court should deny certiorari.

B. Welch's statistical arguments are both inappropriate and unsound.

In his Petition, Welch fails to identify any inter-circuit conflict that would warrant certiorari. To the contrary; he laments that the courts have treated the issue "consistent[ly]." (Pet. at 22). Instead of identifying a fissure in the case law, Welch spends much of his Petition decrying that few whistleblowers have obtained final judicial relief under § 1514A. (Pet. at 22-23).

The outcomes of other cases do not, of course, shed any light on the merits of the present case. Nor do the legal analyses in those other decisions reveal whether the Court of Appeals in *this* case properly analyzed the legal issues presented to it. Cases must be decided on their own facts and on the law—not on statistics.

But this Court also should reject Welch's claim that the lower tribunals have rendered Section 1514A "a sham." (Pet. at 23). To begin, it is not true that the ARB has not ruled for any whistleblower. The ARB recently issued a final decision awarding relief to a Sarbanes-Oxley whistleblower claimant. *See Kalkunte v. DBI Financial Services, Inc.*, ARB Case Nos. 05-139 and -140 (ARB Feb. 27, 2009) (letter opinion available at http://www.oalj.dol.gov-/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/-05_139.SOXP.PDF).

Even more to the point, statistics on fully litigated cases are a poor index of whether the statute is working as intended. Such statistics do not include settled cases. Nor do they include conduct that has been deterred because of the statute. With respect to cases that are actually brought, baseless cases likely

will be fought, and meritorious cases likely will be settled. So the fact that few fully litigated and appealed cases have resulted in employee victories does not show that the objectives of the statute are being frustrated.[13] And it certainly does not show that *this* case was improperly decided.

III. WELCH'S BELATED ARGUMENTS TO THIS COURT AND TO THE COURT OF APPEALS ALSO FAIL ON THE MERITS.

Because of its waiver holding, the Court of Appeals had no need to—and did not—reach the merits

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[13] The law review article that Welch cites acknowledges this point:

> [T]he settlements and withdrawals certainly impacted the types of cases left to be resolved by administrative decision makers.
>
> The extent of this impact is difficult to determine. Settlement of a case may provide some indication that the case had at least minimal merit and therefore arguably could be counted as an employee success. Indeed, *settlements may have removed the strongest employee cases from the pool of cases*, causing the employee win rate in resolved cases to appear lower than the number of "meritorious" claims actually filed.

Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 96-97 (2007) (emphasis added). The author concludes, cautiously, that "Ultimately, the data presently available regarding Sarbanes-Oxley settlements and withdrawals do not provide definitive answers regarding the objective merit of either the overall pool of cases or the cases that receive administrative decisions." *Id.* at 99.

of Welch's substantial-evidence claims. But even assuming arguendo that the Court of Appeals was wrong on its waiver conclusion, the undisputed facts of this case show that it reached the correct result.

The arguments in the Petition are easily summarized. Welch contends that he thought the misclassification of $195,000 violated GAAP. (Pet. at 20). He claims that this purported GAAP violation was ipso facto a violation of Sarbanes-Oxley. (*Id.*). And he asserts that he therefore was entitled to whistleblower protection for reporting these "violations." (*Id.*). There are fundamental legal and factual problems with this argument.

To begin, Welch provides no legal authority to support the proposition that GAAP violations are per se violations of Sarbanes-Oxley. As this Court has noted, accounting standards are notoriously protean and subject to varying interpretations. *See, e.g.*, *Thor Power Tool Co. v. Comm'r of Internal Revenue*, 439 U.S. 522, 544 (1979) ("'[G]enerally accepted accounting principles' are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions."). But Welch's interpretation of Sarbanes-Oxley elevates *every* minor accounting disagreement—regardless of materiality—into a potential basis for a Sarbanes-Oxley whistleblower complaint. That certainly was not Congress's intent in enacting Section 1514A. Indeed, to adopt Welch's interpretation would, as the ARB observed, "amount[] to wholesale re-writing of SOX's section 1514A." (Pet. App. at 38a).

The Sarbanes-Oxley provisions that Welch cites in his Petition do *not* establish that GAAP violations are violations of Sarbanes-Oxley. Indeed, the cited provisions are not even relevant to this case:

- Section 103, 15 U.S.C. § 7213, *simply* describes the duties of the Public Company Accounting Oversight Board, an entity created to oversee the auditors of public company. This statute does not impose any obligations on private parties.
- Section 108, 15 U.S.C. § 77s(b), authorizes—but does not require—the SEC to accept, as "generally accepted," accounting principles that meet certain criteria. Again, it imposes no obligations on private parties.
- Section 401, 15 U.S.C. § 78m(i), states that all financial reports that are otherwise required to comply with GAAP must "reflect all material correcting adjustments." For this to be triggered, the report must already have been required to be GAAP-compliant *and* the correction itself must be material—neither of which was established in this case.
- Section 302, 15 U.S.C. § 7241, requires corporate officers to certify the accuracy of financial reports presented in periodic statements. It does *not* mandate GAAP compliance. And none of the three "violations" identified by the ALJ and analyzed by the ARB involved a perceived violation of this provision.

Even now, Welch cannot establish the legal premise that violations of GAAP are ipso facto violations of Sarbanes-Oxley.[14]

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[14] Welch, tellingly, has never asserted that he suspected securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5 promulgated thereunder. Such a claim would have failed. *See Day*, 2009 U.S.

(note continued on following page . . .)

Removing that premise, however, causes Welch's entire protected-activity argument to collapse. The only alleged violations of federal securities law that Welch identifies in his Petition are violations of Sarbanes-Oxley. And the only alleged violations of Sarbanes-Oxley are violations of GAAP. But because GAAP violations are not in and of themselves violations of Sarbanes-Oxley and because Welch has provided no other legal explanation for why the alleged violations of GAAP in *this* case were violations of Sarbanes-Oxley, he cannot establish that he had a reasonable belief that the Bank violated any federal securities law. Thus, he cannot establish protected activity under Section 1514A. His whole whistleblower claim unravels.

The factual premise of Welch's protected-activity argument also suffers insurmountable problems. In his Petition, Welch repeatedly asserts that the misclassification of the $195,000 was a violation of GAAP. Indeed, as noted above, his entire argument hinges on that proposition. Yet there was no evidence of this in the record before the Department of Labor. During the evidentiary hearing, Welch simply stated that the misclassification of the $195,000 violated rules of the Federal Financial Institutions Examination Council ("FFIEC"), a body that estab-

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(. . . note continued from previous page)
App. LEXIS 2266, at *37 (noting that "merely stating in conclusory fashion that a company's books are out of compliance with GAAP would not in itself demonstrate liability under section 10(b) or Rule 10b-5" and finding that the plaintiff, who had alleged a GAAP violation, failed to establish that he had engaged in protected activity under Sarbanes-Oxley).

lishes standards for banks.[15] But the laws that Welch relies on concern *GAAP* standards, not *FFIEC* standards. Thus, the alleged FFIEC misclassification of the $195,000 could not supply the GAAP-violation predicate for Welch's whistleblower claim. Thus, the factual premise of his protected-activity argument fails.

In short, even at this late stage in the litigation Welch does not—and cannot—connect the three alleged "violations" with a statute or regulation enumerated in Section 1514A. His protected-activity argument thus fails on the merits.

CONCLUSION

In its opinion, the Court of Appeals held that Welch waived his protected-activity argument by failing to make relevant legal arguments to the ARB. The ruling was dispositive, yet Welch's Questions Presented ignore it entirely. For this reason alone, this Court should summarily deny certiorari.

But as pointed about above, there are additional reasons for denying certiorari. The Court of Appeals did not err in reaching its waiver conclusion. This case does not raise points of law on which the lower

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[15] On page 37 of his brief to the Court of Appeals, Welch incorrectly states that his expert Wynne Baker, testified that "generally accepted accounting principles were violated." He cites page 62 of the Joint Appendix. But that was simply testimony by Welch that "[i]nstead of these recoveries going to the loan loss reserves, as the FFIEC, the Federal Regulations require, they did not go to that recovery account." Welch's expert Wynne Baker never claimed that that the classification violated GAAP. (C.A. App. 288-90). Indeed, he never even mentions GAAP in his expert report.

courts are divided. And Welch's protected-activity claims are both legally and factually unsupported. For all these reasons, Respondent Cardinal Bankshares Corporation respectfully requests that this Court deny certiorari.

Respectfully submitted,

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